IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-1648

INQUIRY CONCERNING A JUDGE NO. 07-64
RE: JUDGE RALPH E. ERIKSSON

JUDGE RALPH E. ERIKSSON'S REPLY BRIEF

On Review of the
Findings, Conclusion and Recommendations of the
Hearing Panel of the
Judicial Qualifications Commission

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Argument I

THE JUDICIAL QUALIFICATIONS COMMISSION (J.Q.C.) EXCEEDED ITS JURISDICTION BECAUSE THE MATTERS THAT THEY INVESTIGATED WERE A JUDGE'S INTERPRETATION AND RULING ON THE LAW, NOT A JUDGE'S CONDUCT. IN SO DOING THE J.Q.C. IS ATTEMPTING TO EVALUATE A JUDGE'S LEGAL ANALYSIS AND TO OVERTURN THE DOCTRINE OF JUDICIAL INDEPENDENCE.

The Reply Brief of the J.Q.C. seems to claim that if the outcome and effect of a judge's ruling causes concern to the public, that somehow confers jurisdiction upon the J.Q.C. This claim is wrong because the operative event is whether the judge's ruling was germane to the proceeding before the court, and relevant at that time. As the Florida Supreme Court said in Inquiry Concerning a Judge, No. 06-249 Re: Michael E. Allen, 998 So.2d 557 (Fla. 2008), "Generally, appellate judges are free to write almost anything in their opinions regarding the decision of the case or the facts and law involved in the case. However, the discussion must be germane to the case at bar and the facts that are within the record of the case." That is the determining moment. The thought process of a judge in making a ruling is the culmination of their legal training, education, research, reasoning and interpretive ability, common sense and

real life experiences. A judge must be free to exercise the decision making process freely. "Every judicial officer is granted broad discretionary powers, and one of the great strengths of our system is the carefully guarded right to exercise independently these powers." In re Inquiry Concerning a Judge, J.Q.C. No. 77-16, 357 So.2d 172 at 179 (Fla. 1978). For the J.Q.C. to analyze Judge Eriksson's rulings indicates they are second guessing a judge's decision and that is beyond their jurisdiction. The J.Q.C.'S proposition is highlighted by their reliance upon In re Kelly, 238 So.2d 565 (Fla. 1970) and their focusing on that opinion which seemed to focus on Judge Kelly's motive, methods and the turmoil it created. Judge Richard Kelly met with newspaper editors and publicized his political views about the judiciary and conducted court in Pasco County in such a way that almost all of the lawyers in the county called for his impeachment. Likewise, Gulf County Judge David Taunton prepared pleadings for (and gave directions to) litigants, used office staff to conduct investigations that were unrelated to his judicial office, publicly accused citizens of illegal conduct, appeared as a character witness without a subpoena, paid a debt for a defendant in his courtroom, and refused to enter final judgments. In re Inquiry Concerning a Judge, J.Q.C. No. 77-16, 357 So.2d 172 (Fla. 1978). Unlike

Judges Kelly and Taunton, Judge Eriksson did not have any improper motive, did not use any improper method in making his rulings and created no turmoil whatsoever in making his rulings. Judge Eriksson's rulings were specifically within the issues in the cases ruled upon.

If the turmoil created by a ruling were the determining factor, then the jurisdiction of the J.Q.C. would cover the Florida Supreme Court's opinions in Florida's 2000 presidential election. The turmoil created caused that court to lockdown the Supreme Court building and to have armed guards present. To paraphrase CNN, "The world is watching." Whether Judge Eriksson's view of the state of the law was a majority view or a minority view, one thing is clear – it was a legitimate view – and as such is not within the jurisdiction of the J.Q.C.

The J.Q.C.'s brief makes the assertion that Judge Eriksson's ruling to revoke Mr. Walton's bond could lead the public to hold the judiciary in disrespect. There was ample testimony by members of the judiciary that Judge Eriksson was within his discretion. More importantly, a judge must be guided by the law, not the public's perception. Public sentiment is not our law and should not dictate how the law is to be administered. (The J.Q.C. would lead one to believe that before a judge rules he must wet his finger, hold it up in the air and

determine the direction of the winds of public sentiment.)

Most importantly the J.Q.C.'s brief seems to repudiate their recently stated position before the Florida Supreme Court when Justice Wells and Justice Pariente were inquiring about where to draw the line when evaluating a judge's judicial decision. Wallace Pope, counsel to the J.Q.C. stated, "When you are criticizing a judge or a justice's approach to the law in analyzing their approach to deciding a legal principal, that is way past anything that the J.Q.C. could ever get involved in." Oral argument before the Florida Supreme Court on December 2, 2008, in the case of In re Allen, at 25 minutes and 40 seconds, 998 So.2d 557 (Fla. 2008).

The J.Q.C. does not have a license to judge and evaluate judicial opinions. In re Allen, *supra*.

Argument II

THE HEARING PANEL ERRED, BOTH PROCEDURALLY AND SUBSTANTIVELY, IN ADMITTING INTO EVIDENCE AND CONSIDERING MATTERS AND TESTIMONY THAT ARE PRECLUDED BY THE FLORIDA CONSTITUTION, JUDICIAL QUALIFICATIONS RULES AND THE FLORIDA STATUTES.

The reply brief of the J.Q.C. fails to admit that in State v. Walters, 719 So.2d 1027 (Fla. 3d DCA 1998) the Third District

Court of Appeal stated: "Section 90.408 of the Florida Evidence Code specifically renders offers to compromise or settle disputed claims inadmissible at trial."

They show no principal of law that allows them to circumvent this statute, or any policy reason to do so.

Argument III

IN COUNT I THE EVIDENCE AND LAW DOES NOT SUPPORT THE HEARING PANEL'S FINDINGS OR CONCLUSIONS, AS IT ATTEMPTS TO FIND THAT JUDGE ERIKSSON WAS MOTIVATED BY ILL WILL, WHEN THE EVIDENCE WAS NOT ONLY THE OPPOSITE BUT THAT HIS ACTIONS WERE PROPER AND WITHIN HIS DISCRETION.

Neither the J.Q.C.'s findings, nor the reply brief submitted by their counsel, answers the essential question raised by the J.Q.C.'s charge in Count I. The question raised is essentially this: What statute, rule or case law says that Judge Eriksson was not permitted to revoke a bond where he found that the defendant's actions were designed to cause a delay in the proceedings and therefore affect the orderly administration of justice. In addition to the case law and rules of criminal procedure cited by Judge Eriksson in his response brief in this case, it should be pointed out that Florida has a body of law that recognizes a judge may determine if a defendant's actions

were designed to disrupt, delay or frustrate the proceedings. In Deren v. Williams, 521 So.2d 150 (Fla. 5th DCA 1988) at page 152 the Fifth District Court of Appeal tacitly recognized this principal when it said: "… we think a motion to disqualify should be denied for untimeliness only when its allowance will delay the orderly progress of the case or it is being used as a disruptive or delaying tactic." The Second District Court of Appeal also recognized the principal in Fleck v. State, 956 So.2d 548 (Fla. 2d DCA 2007) at page 550 when they said: "The trial court made no finding that Fleck was improperly attempting to delay and frustrate the proceedings … ." And, the Florida Supreme Court recognized this principal in State v. Young, 626 So.2d 655 (Fla. 1993), at page 657, and stated: "This Court is mindful of the frustration of trial judges who are burdened with belligerent defendants who attempt to thwart the system any way they can. Our cases make clear that a trial judge is not compelled to allow a defendant to delay and continually frustrate his trial." Mr. Walton's action was clearly a delay tactic, as Judge Eriksson found. Mr. Walton's stated reason was that he had watched Judge Eriksson conducting court earlier in the day and he felt that Judge Eriksson would not be fair. The law does not allow a party that seeks to disqualify a judge to wait for an unfavorable ruling before they ask for a

disqualification (recusal). They must make the motion promptly, or they waive the right to do so. The motion to disqualify must have been made promptly by Mr. Horween when the case was called for jury selection. Instead they asked for another continuance, and only when that was denied did they make the oral motion to recuse. The Fifth District Court of Appeal stated in Dura-Stress, Inc. v. Law, 634 So.2d 769 (Fla. 5th DCA 1994) at page 775: "I acknowledge that principal of law that a party should not be allowed to lay back and wait to see if they get a favorable result before filing a motion to disqualify." The lack of good faith in Mr. Walton's case was demonstrated by Mr. Horween's instantaneous and immediate withdrawal of the motion to continue, upon Judge Eriksson's revocation of the bond.

If there is to be any judicial control over a docket a judge must have leeway to control their docket. When a judge applies the principal laid out in State v. Young, *supra*, by using Fla. R. Jud. Admin. 2.085, by using the criminal procedure rules set out in Fla. R. Crim. P. 3.131(e)(f) and (g), and by attempting to properly apply the bail revocation statute, § 903.046(2)(d), Fla. Stat., this is completely within their discretion. The very fact that the hearing panel evaluated the law and the facts in this ruling shows that it was within the judge's discretion and therefore outside of the jurisdiction of

the J.Q.C.

The J.Q.C.'s reply brief also fails to point out that Judge Eriksson was originally charged by the J.Q.C.'s investigative panel of erroneously revoking two bonds. One bond was that of Mr. Walton and the other was Mr. Bradshaw's. There was no dispute that Judge Eriksson revoked each bond. By the very nature of the finding by the hearing panel that Judge Eriksson did not err in revoking Mr. Bradshaw's bond, the hearing panel is acknowledging that their exists a body of law that allows a judge to do this. For the J.Q.C. to agree with Judge Eriksson in one instance, but not in the other, shows that the hearing panel examined the judge's decision. The decision is the same as a ruling and the J.Q.C. is not within their jurisdiction when they assess a judge's ruling.

Additionally on this point the J.Q.C. seems to somehow find that Judge Eriksson was motivated by ill will but points to no basis for such finding. There was no evidence of ill will in this case and a thorough examination of the record does not reveal any.

Argument IV

IN COUNT III THE EVIDENCE AND LAW DOES NOT SUPPORT THE HEARING PANEL'S FINDINGS OR CONCLUSIONS. IT ATTEMPTS TO OVERTURN THE DOCTRINE OF JUDICIAL INDEPENDENCE BY REPLACING

PROCEDURAL CASE LAW WITH PROCEDURAL STATUTORY LAW, AND THIS CAN NOT BE DONE BECAUSE PROCEDURE IS A MATTER TO BE DETERMINED BY THE COURT, NOT THE LEGISLATURE.

The reply brief of the J.Q.C. fails to point out that neither the statutes that address Injunction for Protection proceedings, nor the pronouncements in Family Court III, indicate that a judge is to assist a party that chooses to proceed pro se any differently than a party who chooses to be represented by an attorney; nor is the proceeding to be relaxed or informal; nor is the proceeding to be grounded upon hearsay. The only place in Florida law that appears to readily allow the admission of hearsay is in violation of probation cases. "Although the rules of evidence are relaxed at probation violation hearings and hearsay evidence may be introduced, a finding of probation violation cannot be sustained on hearsay evidence alone." Purvis v. State, 397 So.2d 746 (Fla. 5th DCA 1981). "Thus all of the evidence was hearsay and hearsay evidence could not support a probation revocation." J.F. v. State, 889 So.2d 130 (Fla. 4th DCA 2004). "The law is clear that a person's probation cannot be revoked solely on the basis of hearsay evidence." Hall v. State, 744 So.2d 517 at 520 (Fla. 3d DCA 1999). The law in Florida governing Injunction for

Protection cases does not provide for a "relaxed" proceeding, and does not allow for a finding based upon hearsay. Rather, the Florida Supreme Court was very clear in Family Courts III when they said that these proceedings must be determined in an adversarial proceeding. In re Report of the Commission on Family Courts, 794 So.2d 518 (Fla. 2001), at page 530.

The J.Q.C.'s reply brief points out that the charge against Judge Eriksson was that he used an unduly rigid and formulaic method in handling the injunction cases, and that Judge Eriksson did not get "the message." None of these standards are principals of law recognized in Florida, and therefore any finding by the hearing panel must be rejected because it is based upon a charge and a finding that is not a recognized legal standard in Florida law.

What is clear and convincing is that there is obvious and demonstrated friction between the law that the J.Q.C. relies on and the case law that Judge Eriksson has demonstrated (and relied upon). As such, the finding by the hearing panel of the J.Q.C. does not, and can not, meet the clear and convincing evidence test.

Finally, the J.Q.C. finds fault with Judge Eriksson for talking to Justice Pariente and the State Courts Administrator's Office about the way the Injunction for Protection Statute was

being administered in Seminole County. Judge Eriksson's action was not like Judge Richard Kelly (who went to the newspapers) or Judge Cliff Barnes (who went to the newspapers, filed a law suit and publicly criticized his fellow judges). Judge Eriksson made no public or private criticism. He followed proper legal channels and sought to improve the administration of justice. "… we encourage judges to be active in seeking to improve the administration of justice … ." In re Barnes, 2 So.3d 166 (Fla. 2009) at page 175. It has never been a political dispute, but is an ongoing conversation that has brought improvements.

Judge Eriksson's questions to petitioners about how they learned about the injunction for protection petition was not done in a rude, terse or embarrassing manner, but rather in an academic and curious manner, as the DVD evidence bears out. Just as the Supreme Court encourages trial judges to improve the system of justice, a trial judge has to inquire of litigants to find out why it is that so many people come to court ill-prepared or ill-advised. It is only when such an inquiry is made that a trial judge can gain the knowledge to advise the chief judge why the system is failing so miserably.

The J.Q.C.'s findings that Judge Eriksson failed to assist petitioners fails to point out the clear mandate of the Florida Supreme Court that a judge not advocate for a defendant. In re

Gridley, 417 So.2d 950 (Fla. 1982). The law is clear, a judge may not advocate for either party, neither a petitioner nor a respondent. Merriam-Webster Online Dictionary, 2009 defines assist as "to give support or aid" and defines advocate as "one that pleads the cause of another or one that supports or promotes the interests of another." Is there really a difference between assist and advocate in this context? Certainly any difference is not clear and convincing.

Conclusion and Relief Sought

This Court must determine if the hearing panel, composed not just of judges but also lawyers and lay people, could wipe from their minds all improperly admitted evidence so as to not be tainted by it and prejudiced against Judge Eriksson because of it, and then properly reach their findings. It is submitted that lawyers and lay people are not cognizant of this principal, nor by their training are they able to disregard improperly admitted evidence. Therefore the findings and conclusions of the hearing panel must be rejected, or sent back to the hearing panel for a new hearing that considers only legally admissible evidence.

This Court must study the record and independently assess not only the ruling by the hearing panel of the admissibility of evidence raised in the pre-trial motion in *limine*, but also the

factual findings of the J.Q.C. The issues in this case are both the clarity of the state of the law, and the rulings by Judge Eriksson. It is submitted that in this type of case a *de novo* review is mandated to see if the correct law was applied in this case, and then to see if the evidence presented meets the standard of clear and convincing evidence. To leave a legal issue up to the J.Q.C. would be accepting their view of jurisdiction, and only the Florida Supreme Court can determine jurisdiction.

Respectfully submitted this 6th day of May, 2009.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been delivered by U.S. Mail delivery this 6th day of May, 2009 to:

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CERTIFICATE OF COMPLIANCE

I CERTIFY that the Brief complies with the font requirements of Rule 9.210(a)(2), Florida Rules of Appellate Procedure.

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